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10  
11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

13 MICHAEL MOATES,

14 Plaintiff,

15 v.

16 META PLATFORMS, INC. et al.,

17 Defendants.

Case No. 3:22-cv-04478-JD

**DEFENDANTS REQUEST FOR  
JUDICIAL NOTICE ISO MOTION TO  
DISMISS PLAINTIFF'S AMENDED  
COMPLAINT**

Hearing Date: March 9, 2023  
Time: 10:00 a.m.  
Dept: 19  
Judge: Hon. James Donato

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** Defendants Meta Platforms, Inc. (“Meta”) and Mark Zuckerberg (“Defendants”) request that this Court take judicial notice, pursuant to Federal Rule of Evidence 201, of Meta’s Terms of Service. Defendants make this request in support of the Motion to Dismiss Plaintiff’s Amended Complaint. A true and correct copy of the documents for which judicial notice is requested are attached to the Declaration of Melissa Levin, filed concurrently herewith.

**I. INTRODUCTION**

Defendants respectfully requests that this Court take judicial notice of Meta’s Terms of Service as of October 20, 2020 (dated October 1, 2020). Additionally, Defendants request this Court take judicial notice of Meta’s Terms of Service as of July 13, 2014 (dated November 15, 2013). True and correct copies of these documents are attached to the Declaration of Melissa Levin (“Levin Decl.”).

**II. ARGUMENT**

On a motion to dismiss, a court “must consider the complaint in its entirety, as well as...documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Courts may take judicial notice of facts that are “not subject to reasonable dispute because [they]...can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Courts “must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c)(2).

Such material includes documents incorporated into the complaint by reference. *Swartz v. KMPG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *In re Google Inc.*, 2013 WL 5423918, at \*5 (N.D. Cal. Sept. 26, 2013). Under the doctrine of incorporation by reference, the Court may consider on a 12(b)(6) motion not only documents attached to the complaint, but also documents whose contents are alleged in the complaint, provided the complaint “necessarily relies” on the documents or contents thereof, the document’s authenticity is uncontested, and the document’s

1 relevance is uncontested. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010); *In*  
 2 *re Google Inc.*, 2013 WL 5423918, at \*5.

3 Courts routinely take judicial notice of publicly available terms of service, including from  
 4 the Wayback Machine, in cases like this where the Plaintiff relies upon and references the terms  
 5 in the complaint. *See, e.g., Brown v. Google LLC*, 525 F. Supp. 3d 1049, 1061 (N.D. Cal. 2021)  
 6 (“Courts have taken judicial notice of the contents of web pages available through the Wayback  
 7 Machine as facts that can be accurately and readily determined from sources whose accuracy  
 8 cannot reasonably be questioned.”); *In re Facebook, Inc. Sec. Litig.*, 477 F. Supp. 3d 980 (N.D.  
 9 Cal. 2020) (taking judicial notice of Meta’s privacy policy); *In re Google Assistant Priv. Litig.*,  
 10 457 F. Supp. 3d 797, 813–14 (N.D. Cal. 2020) (taking judicial notice of Google’s Terms of  
 11 Service, Privacy Policy, and a Google blog post); *Matera v. Google, Inc.*, 2016 WL 5339806, at  
 12 \*7 (N.D. Cal. Sept. 23, 2016) (taking judicial notice of Google’s Terms of Service, “various  
 13 versions of Google’s Privacy Policy[,]” and a Google webpage entitled “Updates: Privacy  
 14 Policy”). Publicly accessible websites are also “[p]roper subjects of judicial notice when ruling  
 15 on a motion to dismiss.” *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1204 4 (N.D. Cal. 2014)  
 16 (Koh, J.) (taking judicial notice of web pages).

17 Here, Plaintiff brings multiple claims premised on Meta’s Terms of Service and his use of  
 18 Meta’s services, which are governed by those Terms. *See* Complaint ¶ 33. Plaintiff further  
 19 alleges that his account was disabled on October 20, 2020. Complaint ¶ 15. Indeed, Plaintiff  
 20 makes various allegations related to his use of Facebook, up until he was removed in October  
 21 2020. *See, e.g.,* Complaint ¶ 28. Despite this, Plaintiff does not reference specific language  
 22 contained in the 2020 Meta’s Terms of Service in his Complaint. But both the 2013 and 2020  
 23 Terms of Service require a user to acknowledge that, by continuing to use Facebook’s services,  
 24 the user assents to modifications to those terms posted on the Facebook website. *See* Levin Decl.,  
 25 Ex. B (“By using or accessing Facebook, you agree to this Statement, as updated from time to  
 26 time in accordance with Section 14 below.”). It is therefore appropriate for the Court take  
 27 judicial notice of the Terms of Service effective on October 20, 2020, in order to “prevent  
 28

1 plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting documents upon which  
2 their claims are based[.]” *Swartz*, 476 F.3d at 763 (internal quotation marks omitted).

3 Additionally, Meta’s Terms of Service are the proper subject of judicial notice as publicly  
4 available websites. The content of a publicly available web pages is “not subject to reasonable  
5 dispute” and “can be accurately and readily determined from sources whose accuracy cannot  
6 reasonably be questioned.” Fed. R. Evid. Rule 201(b) & (b)(2). Therefore, these documents are  
7 subject to judicial notice, as it appears on a publicly accessible website and its authenticity cannot  
8 reasonably be questioned. *See In re Yahoo Mail Litig.*, 2014 WL 3962824, at \*1025 (N.D. Cal.  
9 Aug. 12, 2014) (Koh, J.) (taking judicial notice, sua sponte, of various publicly accessible  
10 websites); *In re Google Assistant Privacy Litig.*, 457 F. Supp. 3d 797 (taking judicial notice of  
11 Google’s privacy policy).

12  
13 Dated: January 23, 2023

ORRICK, HERRINGTON & SUTCLIFFE  
LLP

14  
15 By: /s/ Jacob M. Heath  
16 JACOB M. HEATH

17 Attorney for Defendant  
18 META PLATFORMS, INC.